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RECORD AND BRIEFS

No. 16-476

IN THE

Supreme Court of the United States

GOVERNOR CHRISTOPHER J. CHRISTIE, *et al.*,
Petitioners,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners respectfully submit this supplemental brief pursuant to this Court's Rule 15.8 to respond to the invited brief of the United States.

The brief of the United States confirms the urgent need for this Court's review. Though it cannot cite a single example (other than this case) of federal law ever being applied to enjoin a State from repealing its own state-law prohibitions on private conduct, the federal government unabashedly claims the authority to "preempt" any "repeal of existing law" that has "prohibited features" or "results." U.S. Br. 18, 19. In other words, States may *not* repeal their own laws except "according to Congress's instructions." *New York* v. *United States*, 505 U.S. 144, 162 (1992).

That startling view of dual sovereignty is deeply destructive of our federalist system and it is incompatible with this Court's anti-commandeering precedents.

It also is a flat-out recantation of what the Solicitor General told this Court just three years ago in *Christie I*. There, in response to Petitioners' argument that PASPA impermissibly commandeered the States by requiring them to maintain prohibitions on sports wagering, the Solicitor General reassured this Court that PASPA did nothing of the sort because it left States "free to repeal those prohibitions in whole or in part." U.S. Br. in Opp. at 11, *Christie I*, Nos. 13-967, 13-979, and 13-980 (U.S. May 14, 2014) ("*Christie I* U.S. BIO"). Now, the Acting Solicitor General says that, "in context," what the government "meant" is that States are "free to repeal those prohibitions . . . in part" only to the extent the State's repeal "is not a *de*

facto authorization." U.S. Br. 14, 15 (internal quotation marks omitted).

But that new spin is irreconcilable with the government's arguments in the court of appeals. There, the government never even remotely suggested that a repeal could be a "*de facto* authorization." The government, in fact, took the opposite position: Because PASPA prohibits only "authoriz[ing] *by law or compact*," a "repeal . . . would not constitute such an 'authorization' because there would be no State statute or compact granting anyone authorization to conduct sports wagering." U.S. Br. at 29, 30, *Christie I* (3d Cir. 2014) ("*Christie I* U.S. Br."). Indeed, the government continued, "by reading PASPA to require States to maintain their existing sports gambling prohibitions, New Jersey proffers an interpretation that would create ***substantial constitutional doubt***. Consequently PASPA cannot be properly read to require New Jersey to maintain or enforce prohibitions on sports wagering." *Id.* at 31 (emphasis added).

The *Christie I* panel adopted this argument wholesale, acknowledging that reading PASPA to require New Jersey to "keep a ban on sports gambling in [its] books" would "raise a series of constitutional problems." Pet. App. 160a. But it concluded it could avoid those problems because New Jersey's view of PASPA's requirements "rest[ed] on a false equivalence between repeal and authorization and reads the term 'by law' out of the statute." *Ibid.* Opposing review of that decision, the Solicitor General defended that analysis as "correct." *Christie I* U.S. BIO 9. *That* is the "context" in which the Solicitor General argued to this Court that, under PASPA, States were free to repeal their sports-wagering prohibitions "in whole or in part,"

and that "*therefore* . . . PASPA does not commandeer the governmental machinery of New Jersey." *Id.* at 11 (emphasis added).

The government's opportunistic evolution of its position is obvious and irrefutable. But so is the "substantial constitutional doubt" it "create[s]." *Christie I* U.S. Br. 31. The government does not acknowledge that doubt now, of course, but that is why this Court's review is needed. The metes and bounds of the States' reserved sovereignty should be clear and enduring—not subject to the federal government's creeping incursions under the cover of morphing interpretations of federal statutes. The petitions should be granted.

I. The Lower Courts' Unprecedented Injunction of a Repeal of State-Law Prohibitions Deeply Undermines State Sovereignty

1. The United States does not—because it cannot—deny that Congress "lacks the power directly to compel the States . . . to prohibit" acts that Congress has authority to prohibit directly. *New York*, 505 U.S. at 166. But it argues that PASPA is "'consistent with the constitutional principles enunciated in *New York* and *Printz*,'" because it "'does not require the States in their sovereign capacity to regulate their own citizens.'" U.S. Br. 14 (quoting *Reno* v. *Condon*, 528 U.S. 141, 151 (2000)).

Yet as construed by the Third Circuit here, that is precisely what PASPA does. Indeed, the United States itself acknowledges that "a federal statute and a federal court have effectively required New Jersey 'to maintain state-law prohibitions that its elected officials chose to lift.'" U.S. Br. 18 (quoting Pet. 3). And

that *is* requiring States "to regulate their own citizens." There is no daylight between the two.

This is no mere federalism foot fault. As this Court observed in *FERC* v. *Mississippi*, "having the power to make decisions and to set policy is what gives the State its sovereign nature" and is "central to a State's role in the federal system." 456 U.S. 742, 761 (1982). Now, however, a federal-court injunction is authoring the contents of the State's prohibitions on sports wagering, wresting from the State's Legislature its sovereign authority over its State's laws and reducing its officials to "puppets of a ventriloquist Congress." *Printz* v. *United States*, 521 U.S. 898, 935 (1997) (quotation omitted). That reordering of our system of federalism warrants this Court's review.[1]

2. Though it cannot muster even one other example of a federal law being applied to enjoin a repeal of state law, the United States suggests that federal statutes prohibiting repeals of state law, in fact, are "commonplace." U.S. Br. 10. That is because the government now has redefined preemption to include the

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[1] The government argues that Section 3702(1) is a law that "permissibly 'pre-empt[s] state laws regulating private activity.'" U.S. Br. 14 (quoting *Hodel* v. *Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981)). But a repeal manifestly is not a law that *regulates* private activity and *Hodel* cannot otherwise be read to authorize a federal law commanding the States to maintain state-law prohibitions. *See* Pet. 26–28. Nor can the government draw support from *South Carolina* v. *Baker*, 485 U.S. 505 (1988), which recognized that the federal government may not "seek to control or influence the manner in which States regulate private parties." *Id.* at 514. That, undeniably, is what the lower courts' injunction does.

power to forbid a "repeal of existing law" that has "prohibited features" or "results." U.S. Br. 18, 19.[2]

At the level of first principles, the notion of federal preemption of a *repeal* of state law is nonsensical. As Judge Fuentes pointed out in his dissent, "[a] repealed statute is treated as if it never existed; a partially repealed statute is treated as if only the remaining part exists." Pet. App. 68a–69a; *see also id.* at 69a n.6 (citing *Ex Parte McCardle*, 74 U.S. 506, 514 (1868)). Federal law can conceivably displace only that which exists.

The government nevertheless argues that where a repeal of state law leads to a "result[]" prohibited under federal law, the repeal is preempted. U.S. Br. 19. To prove the point, the government invokes 15 U.S.C. § 391, which provides that "[n]o State . . . may impose or assess a tax on or with respect to the generation or transmission of electricity which discriminates against out-of-State manufacturers, producers, wholesalers, retailers, or consumers of that electricity." The government supposes that, if a State repealed a tax on electricity only as "applied to in-state entities," it validly could require the State to "maintain" the repealed tax because Section 391 prohibits the discrimination that "results from the partial repeal." U.S. Br. 19.

The government's claim to this authority under Section 391 is dubious, at best. When a State is held to violate Section 391, the out-of-state ratepayers are awarded relief from the discriminatory tax imposed by

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[2] Notably, unlike the Leagues, the Acting Solicitor General nowhere disputes that the 2014 Act is a "true" repeal. Leagues' BIO 30; *see also* Pet. Reply 8 n.1.

the State. *See, e.g., Arizona Public Serv. Co.* v. *Snead*, 441 U.S. 141, 150 (1979). The government cites no case under Section 391 in which a federal court has commanded a State to maintain or raise taxes on in-state entities, and New Jersey is not aware even of a case in which a ratepayer has sought such extraordinary relief.[3]

Yet, the arresting assertion of federal power reflected in the government's reading of Section 391 amply demonstrates the danger of its theory to our federalist system of dual sovereigns. If the anti-commandeering doctrine permits the federal government to compel a State ***to raise taxes*** on its citizens, then the lines of accountability between citizens and their elected officials that the doctrine protects would be in grave peril, indeed. That federally imposed state tax would not be collected by the Internal Revenue Service; it would be levied by state taxation authorities, who surely would "suffer the consequences" of the undoubtedly "unpopular" policy of collecting a tax the Legislature had repealed. *New York*, 505 U.S. at 168.

So too, under PASPA, which, as construed by the Third Circuit, compels New Jersey officials to maintain a ban on sports wagering activities that the Legislature has repealed. While the federal authors of New Jersey's ban remain out of "view of the public," *New York*, 505 U.S. at 168, Petitioners are left to "tak[e] the blame," *Printz*, 521 U.S. at 930. Our constitutional structure does not permit that result, and

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[3] Similarly, the government cites no case under any of its "[e]quivalent examples," U.S. Br. 12 n.5, 19 n.6, in which a State has been enjoined from repealing a state law, and New Jersey is aware of no such case.

the government's suggestion here that it does only confirms its broad departure from any accepted understanding of state sovereignty and the need for this Court's review.

3. The government suggests that PASPA passes constitutional muster because, even though PASPA prohibits New Jersey's "'specific partial repeal,'" PASPA still "'allows states to choose among many different potential policies.'" U.S. Br. 16 (quoting Pet. App. 23a). That is incorrect for two independent reasons.

First, Congress simply "lacks the power directly to compel the States . . . to prohibit . . . acts." *New York*, 505 U.S. at 166. It follows that Congress lacks the power to bar the States from repealing prohibitions on such acts because "in either case, the state is being forced to regulate conduct that it prefers to leave unregulated." *Conant* v. *Walters*, 309 F.3d 629, 646 (9th Cir. 2002) (Kozinski, J., concurring). An impermissible federal requirement that States prohibit sports wagering in casinos is not sanitized by the suggestion that States may be able to lift prohibitions on sports wagering in other venues. Nor can Congress circumvent the restriction by attaching onerous conditions to the State's lifting of particular prohibitions. *Cf. Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2602-2603 (2012) (opinion of Roberts, C.J.); *see also* Pet. 28 n.4. Thus, the government's suggestion that federal law might permit New Jersey to lift its prohibitions on sports wagering in casinos and racetracks if it were willing to "repeal its prohibition on sports gambling altogether," U.S. Br. 15, or at a broader range of venues, does not cure the constitutional problem.

Second, under the Third Circuit's construction of PASPA, the "'many different potential policies'" supposedly available to the State are illusory. U.S. Br. 8 (quoting Pet. App. 23a); *see also* Pet. 32–34; Pet. Reply 12. The Third Circuit concluded that New Jersey's repeal constituted an "authorization" under PASPA because it "selectively grants permission to certain entities to engage in sports gambling," Pet. App. 14a—something that necessarily would be true of any repeal "in part." *Christie I* U.S. BIO 11; *see also* Pet. App. 13a (citing dictionary definition of "authorize"). And, though the Acting Solicitor General seems to forget it now, below the United States argued that any repeal intended to promote economic development violates PASPA, which would seem to take off the table even a complete repeal of all sports wagering prohibitions. U.S. Amicus at 9, *Christie II* (3d Cir. 2015). Indeed, all the government is willing to concede PASPA permits is the ability to "lift[] state penalties on informal or social wagering"—though why that is not also a "*de facto* authorization" is never explained. U.S. Br. 15.

The government argues that Petitioners cannot complain about this "lack of clarity," repeatedly claiming that Petitioners do not seek "review of the court of appeals' statutory holding." U.S. Br. 9, 15, 16, 21. But the government cannot have it both ways. If the range of "potential policies" available to the States is relevant to the commandeering analysis (as the Third Circuit evidently thought, *see* Pet. App. 23a), then so is

the correct construction of the statute that defines the policy options that are available to States.[4]

The government's suggestion that New Jersey asked the court of appeals to "opine on hypothetical cases or laws," U.S. Br. 21, is disingenuous. What New Jersey sought was a clear interpretation of PASPA in view of the Tenth Amendment that would clarify what repeals of state-law sports-wagering prohibitions PASPA permits. The Third Circuit replied, in substance, "not yours." The continuing confusion with respect to the State's ability to exercise its police power in an area of significant social and economic importance amplifies the need for this Court's review.

II. The United States' Remaining Arguments Are Insubstantial

The United States offers just two non-merits reasons to deny review. Neither withstands scrutiny.

1. The United States observes that there is no split of authority concerning the constitutionality of

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[4] Moreover, though Petitioners' challenge is directed to the constitutionality of PASPA as interpreted by the Third Circuit, that does not preclude the Court from reviewing that interpretation as a matter of constitutional avoidance. *See Nat'l Fed'n of Indep. Bus.*, 132 U.S. at 2593. That, after all, was the approach the Third Circuit—at the urging of the United States—took to resolve New Jersey's constitutional challenge in *Christie I*. And the Court would not need to strain to conclude that New Jersey's repeal, even if it could be labeled a "*de facto* authorization," U.S. Br. 15, is not an "authoriz[ation] by law." 28 U.S.C. § 3702(1). Indeed, though the government now argues the 2014 Act's "partial repeal" is "equivalent" to an authorization by law, U.S. Br. 17, the Solicitor General previously embraced as "correct," the Third Circuit's rejection of that "false equivalence" because it reads "by law" out of the statute. *See supra* p. 2.

PASPA. U.S. Br. 21–22. But as demonstrated above and in the petition, the decision below conflicts directly with the bedrock principle of federalism that Congress may not "regulate state governments' regulation of interstate commerce." *New York*, 505 U.S. at 166. This Court did not await a circuit split before reviewing the challenge to the statute at issue in *New York*, *see* Pet. Reply 12–13, nor did it demand that New York's challenge to the federal requirement be duplicated by other States, *see New York*, 505 U.S. at 154 (noting States' compliance with the federal legislation). The Court granted review to address "the proper division of authority between the Federal Government and the States." *Id.* at 149. The federal intrusion into state sovereignty in this case– a federal court directly determining the contents of a State's laws—is at least as great as that presented by the "take title" provision in *New York*, and review is at least as warranted.

2. The United States argues that the question presented has "limited practical significance," U.S. Br. 10, because, even if Section 3702(1) is invalid, Section 3702(2) independently would ban the sports wagering as to which New Jersey has lifted its own prohibitions. U.S. Br. 22–23. That is both incorrect and irrelevant.

It is incorrect because, as explained in *Christie I*, Section 3702(2) reaches only private activity conducted "pursuant to state law." Pet. App. 166a. Under New Jersey's repeal (quite unlike the licensing scheme at issue in *Christie I*) any sports wagering that takes place would happen not "pursuant to" state law, but because of its *absence*. This explains why the

Leagues never sued petitioners in Case No. 16-477 under Section 3702(2), *see* Dist. Ct. D.E. 1 ¶ 59, and why the Leagues and the United States instead have persisted in their demands that New Jersey itself continue to prohibit sports wagering.[5]

In any event, whether Section 3702(2) prohibits sports wagering by private persons as a matter of federal law is utterly irrelevant to the question presented, which is whether the federal government can continue to compel *New Jersey* to prohibit its citizens from engaging in those activities. If the government is correct and Section 3702(2) prohibits New Jersey's casinos and racetracks from engaging in sports wagering regardless of whether New Jersey continues to prohibit that activity, then invalidation of Section 3702(1) finally would task the federal government with administering and enforcing its own proscription against sports wagering. The end of the federal government's conscription of the States' legislative apparatuses to impose that prohibition, and the restoration of an appropriate line of accountability for it to federal officials, would have immense "practical significance" to Petitioners, the people of the State of New Jersey, and to our system of federalism.

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[5] Section 3702(2) also does not prohibit sports wagering "independently" of Section 3702(1) because, as Petitioners previously argued below, Section 3702(1) is not severable. State Opening Br. at 53–54 & n.9 (3d Cir. 2013).

CONCLUSION

The Court should grant the petitions.

Respectfully submitted,

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